IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 756

SYSTEM FEDERATION No. 91 RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, et al.,

Petitioners,

vs.

O. V. WRIGHT, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONERS

RICHARD R. LYMAN
741 National Bank Building
Toledo 4, Ohio

ROBERT E. HOGAN
Kentucky Home Life Building
Louisville, Kentucky

Attorneys for Petitioners

Of Counsel:

SCHOENE & KRAMER
1025 K. Street, N.W.
Washington 6, D. C.

MCHUGHLAND, ROBIE & HICKEY
741 National Bank Building
Toledo 4, Ohio

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OPINIONS BELOW

The opinion of the District Court (R. 69) is reported at 165 F. Supp. 443, and the opinion of the Court of Appeals (R. 150) at 272 F. (2d) 56. The original unreported consent decree of injunction (entered December 7, 1945), modification of which is sought herein, appears at page 36 of the record herein.

JURISDICTION

The judgment of the Court of Appeals (R. 149) was entered December 5, 1959. The jurisdiction of this Court was invoked under Section 1254(1) of Title 28, United

States Code, and the petition for writ of certiorari was granted by the Court on April 18, 1960 (R. 153).

STATUTE INVOLVED

Section 2, Eleventh of the Railway Labor Act, as amended by the Act of January 10, 1951, c. 1220, 64 Stat. 1238, U.S.C. Tit. 45 Sec. 152, Eleventh:

> "Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.
>
> "(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initia-

tion fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in Section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to sub-paragraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership

from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended."

QUESTIONS PRESENTED

1. Did the 1951 Amendments to the Railway Labor Act entitle statutory bargaining representatives, previously enjoined from discriminating against non-union employees, to modification of the injunction so as to permit negotiation of union security agreements expressly authorized by such amendments?

2. Were such bargaining representatives precluded from obtaining modification of the injunction by the consent nature of the original decree?

3. May a court refuse to permit negotiation of union security agreements authorized by Congress, on the basis of bitterness and hostility between union and non-union employees resulting from strike-breaking activities of the latter, and having no connection with the injunction sought to be modified?

STATEMENT OF THE CASE

Petitioners, System Federation No. 91 of the Railway Employes' Department, AFL-CIO, and a group of affiliated international and local labor organizations, originally defendants below, seek review of a judgment affirming the District Court's denial of their motion to modify a decree of injunction entered December 7, 1945. The requested modification would remove from the scope of the

injunction's prohibitions conduct which, while unlawful when the decree was entered, has subsequently been made lawful by Act of Congress.

The action originated on July 16, 1945, when O. V. Wright and twenty-seven other named plaintiffs brought suit against respondent Railroad, labor organizations representing the involved crafts or classes of its employees, and their subordinate lodges or local unions on the property of respondent Railroad, claiming that they had been subjected to unlawful discrimination in violation of the Railway Labor Act (45 U.S.C., Sec. 151 et seq.). Plaintiffs were not members of the defendant labor organizations, and the gist of the complaint (R. 15-35) was that the defendants had discriminated against non-members of the organizations in matters of promotion, seniority, overtime, leaves of absence, and other employment benefits under the applicable collective bargaining agreements, because of such non-membership. The complaint prayed for a declaratory judgment establishing the right of plaintiffs and other non-members of the defendant labor organizations, under the Railway Labor Act, to equal treatment with other employees in the enjoyment of such benefits of their employment; an injunction prohibiting defendants from future discriminations of the sort complained of; and damages of $5,000 each for the named plaintiffs, for alleged past discrimination (R. 32-35.)

Thereafter, defendants consented to a declaratory judgment and injunction, entered by the court on December 7, 1945 (R. 36), purporting to declare the rights, duties and obligations of the parties under the Railway Labor Act and agreements negotiated pursuant thereto, and enjoining defendants from requiring plaintiffs and the classes represented by them to join or retain membership in any of the defendant labor organizations as a condition of enjoyment of rights and benefits under the collective

bargaining agreements, denying them such rights and benefits because of their failure or refusal to join or to retain their membership, or discriminating against them in the application of the bargaining agreements because of failure or refusal to join or retain such membership. The claims of the twenty-eight named plaintiffs for monetary damages were separately settled and not covered by the decree.

In the decree the court retained control of the action for the purpose of entering such further orders as might be deemed necessary or proper. (R. 38.)

At the time of institution of this action, and entry of the foregoing decree and injunction, the Railway Labor Act, and particularly Section 2, Fourth and Fifth thereof, made it unlawful for carriers to interfere in any way with the organization of their employees, or to coerce or compel their employees to join or remain or not to join or remain members of any labor organization, and such prohibitions were generally construed as creating an "open shop" in the railroad industry, and making unlawful closed shop, union shop or other forms of union security agreements.

However, by Act of January 10, 1951 (64 Stat. 1238; 45 U.S.C. 152, Eleventh) the Congress of the United States amended the Railway Labor Act to permit, within defined limits, the making of union security agreements by carriers subject to the Act. Negotiation, and efforts to negotiate, union security agreements pursuant to such amendment resulted in litigation challenging their legality and the constitutionality of the amendment itself, and it was not until May 21, 1956, that an authoritative ruling was obtained from this Court, in *Railway Employes' Department, AFL v. Hanson*, 351 U.S. 225, upholding the validity of the amendment and agreements negotiated pursuant thereto.

Subsequently the moving defendants, and other labor organizations representing different crafts and classes of defendant Railroad's employees represented by them under the Railway Labor Act, upon seeking a union security agreement of the sort authorized by Section 2, Eleventh, of the Act as amended, were met with a refusal by the Railroad to negotiate such agreement or agreements for the asserted reason that it feared that to do so would subject it and the defendant labor organizations to charges of contempt for violation of the injunction of December 7, 1945.

Pursuant to notice served on counsel of record for defendant Railroad and the original plaintiffs, O. V. Wright, et al., on July 2, 1957, a motion was filed by the System Federation and affiliated international unions, petitioners here, pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure, seeking modification of said decree of injunction of December 7, 1945, by adding to and incorporating therein a proviso to the effect that it should not operate to prohibit defendants, or any of them, from negotiating, entering into, or applying and enforcing, any agreement or agreer ents authorized by Section 2, Eleventh of the Railway Labor Act, as amended January 10, 1951. (R. 39-43.)

Responses opposing the requested modification of the injunction were filed on behalf of some of the original plaintiffs (R. 47 and 56), the respondent Railroad (R. 51), and additional individual employees whose intervention was allowed on February 3, 1958. (R. 61, 68.) Following additional hearings, entries of appearance on behalf of additional labor organization defendants, and the filing of numerous briefs (R. 11-14), the District Court, under date of August 7, 1958, issued its memorandum opinion (R. 69) refusing to modify the injunction.

The District Court, while conceding that it had the

authority to grant the requested modification of the injunction, refused to do so for the stated reason that the amendment of the Railway Labor Act, in 1951, did not constitute a sufficient change in circumstances to authorize a modification of the decree. Although stating that it was "not decisive of the question involved on the pending motion", the District Court recognized the existence of bitterness and hostility between union and non-union employees, as well as union members who had worked during a strike in 1955, as a factor in its refusal to modify the 1945 injunction. And finally, the District Court took the view that the original injunction, being a consent decree, would be construed as encompassing an agreement that in the future there would never be any requirement of union membership as a condition of employment, and that hence it would leave the parties "as they agreed to be and to remain".

In its per curiam opinion (R. 150) the Court of Appeals affirmed the order denying modification of the injunction, for the reasons set forth in the District Court's opinion. Like the District Court, it placed large emphasis (though without any showing of relevance) upon hostility and bitterness attending strikebreaking activities in the 1955 strike. And it similarly construed the consent decree of injunction as a contract, saying "the parties therein, by their consent thereto, provided that no such requirement of union membership should thereafter be in effect in any bargaining agreement under the Act".

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Western District of Kentucky, was alleged by the original plaintiffs to be "the Act of Congress of June 21, 1934,[1] 48 Stat. 1185, 45 U.S.C.A., ch. 8, being an act to regulate interstate commerce; 28 U.S.C.A., sec. 41 (8); Federal Rules of Civil Pro-

[1]The Railway Labor Act.

cedure, Rule 57, 28 U.S.C.A., sec. 723; 28 U.S.C.A., sec. 400". (R. 18.)

SUMMARY OF ARGUMENT

The injunction sought to be modified was part of a judgment entered in 1945 declaring and protecting rights under the Railway Labor Act as it then existed. Amendment of the statute in 1951 to permit negotiation of union security agreements entitled petitioners to a *pro tanto* modification of the injunction, so as to eliminate the prohibition against conduct now expressly authorized by Congress. While injunctions are issued to protect legal rights, they are not the source of the rights. Where as here the source of the right lay in the statute, subsequent legislative action eliminating the right entitled petitioners to modification as a matter of law. The trial court possessed no judicial discretion to deny petitioners benefits which Congress had said they should be permitted to enjoy, or to perpetuate injunctive protection of a right which, by virtue of the change in the law, had ceased to exist.

It is well established that the right to obtain modification of an injunction is not affected by the consent nature of the decree. It is still to be treated as a judicial act and not a contract. The Railway Labor Act was the source both of the right protected by the decree and the jurisdiction to issue it; and the possibility of subsequent modification or termination of the injunction, should the right be terminated and jurisdiction withdrawn by a change in the law, was inherent in the consent. The courts below erred in construing the conduct of the parties in agreeing to the entry of the decree as an independent contractual undertaking warranting perpetuation of the injunction after the statutory right had been extinguished by Congressional action. If the reasoning of the courts below were to pre-

vail, all consent decrees of injunction would be immune from modification, on the theory of an implied contract compelling the courts to leave the parties "as they agreed to be and to remain".

The courts below erred in predicating their refusal to modify the injunction in part, at least, upon improperly received evidence of bitterness and hostility occasioned by strike-breaking activities of some of respondent carrier's employees in 1955, having no connection with the injunction and no relevance to the question of whether it should be modified to permit negotiation of union security agreements. Congress carefully prescribed the conditions upon which union security agreements might be maintained, effectively eliminating any possibility of their use as instruments of discrimination. No substantive rights of the respondents would be affected by the requested modification. On the other hand, perpetuation of the injunction would subject petitioners to punishment for seeking an objective specifically authorized by Congress; would deny them the substantial benefits of union security agreements with attendant financial contributions from plaintiffs and others who for years have used the injunction as a shield for their "free rider" status; and would offer no hope for amelioration of the bitterness and hostility which respondents say has existed, between union and non-union employees, under the aegis of the 1945 injunction.

ARGUMENT

I. The 1951 Amendments to the Railway Labor Act entitled petitioners, previously enjoined from discriminating against non-union employees, to modification of the injunction so as to permit negotiation of union security agreements expressly authorized by such amendments.

Nine years ago the Congress of the United States, in

enacting Section 2, Eleventh, of the Railway Labor Act (45 U.S.C., Sec. 152 Eleventh) provided that labor organizations representing employees in the railroad industry "shall be permitted" to negotiate union security agreements. After much litigation the validity of that enactment was established by this Court in *Railway Employes' Department, A.F.L. v. Hanson*, 351 U.S. 225. Yet today representatives of the entire shop-craft group of employees of one of the nation's largest Class I Railroads[2] stand perpetually enjoined, in the light of the decisions below, from seeking the benefits of union security agreements. The effect of the denial of the requested modification of the 1945 injunction is to maintain an everlasting prohibition against what Congress has said shall be permitted; to perpetuate a restraint against conduct now and for the last nine years completely lawful; to maintain in effect a remedy for a right which has become non-existent; and to subject labor organizations to the injunctive processes of the federal courts long after the withdrawal of jurisdiction to grant such an injunction.[3]

Prior to 1951 there were a number of instances in which injunctions were issued to compel compliance by statutory bargaining representatives in the railroad industry with the principles enunciated by this Court in 1944 in *Steele v. Louisville & Nashville Railroad Company*, 323 U.S. 192, and *Tunstall v. Brotherhood of Locomotive F. &*

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[2]On March 1, 1957, the Interstate Commerce Commission in *Finance Docket No. 18845, Louisville & Nashville Railroad Company, et al., Merger, etc.*, approved the acquisition of the properties of the Nashville, Chattanooga & St. Louis Railway by the Louisville and Nashville Railroad Company through a merger of the two railroads. (295 I.C.C. 457).

[3]The trial court's jurisdiction to grant the 1945 injunction depended solely on the Railway Labor Act. It is elementary that jurisdiction could not be conferred by the consent nature of the decree, or any agreement of the parties. In *Graham v. Brotherhood of L.F. & E.*, 338 U.S. 232, this Court made it clear that the Norris-LaGuardia Act (29 U.S.C., Sec. 101 et seq.) is avoided only when the court is called upon "to compel compliance with positive mandates of the Railway Labor Act" (p. 237). Clearly, in view of the 1951 amendments to the Railway Labor Act, there would be no jurisdiction in a federal court to enjoin union security agreements which the amendments say shall be permitted.

E., 323 U.S. 210.[4] Should the decision below be permitted to stand, they will furnish a basis for depriving numerous organizations, representing employees in various crafts on many railroads, of the benefits of union security agreements. The likelihood of such a development is testified to by the multitude of suits since 1951 involving other aspects of union security agreements in the railroad industry.

Although the specific question of the effect of the 1951 amendments to the Railway Labor Act upon such previously issued injunctions, and the right to obtain modification thereof to conform to the change in the parties' rights and obligations under the statute, has not been passed on by this Court, it is clear that the decisions below are plainly in conflict with basic principles governing injunctions and their modification.

The decree that was entered in 1945 was a judgment defining the then existing rights and obligations of the parties under the Railway Labor Act, and enjoining observance of those statutory duties. Those matters are of course subject to legislative change, and it may not be assumed from the consent nature of the decree that the parties or the court contemplated the establishment in perpetuity of a set of jural relationships independent of and immune from future legislative action.

The holding of the court below that a change in the statute did not justify a *pro tanto* modification of the injunction, removing from the scope of its protection rights which had ceased to exist, is inconsistent with one of the most basic principles to be considered in these cases—i.e., that an injunction is simply a remedy for the protection of a legal right, but is not the *source* of the right.

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[4]It is apparent that these cases supplied the pattern for the delineation of statutory rights and obligations set forth in the December 7, 1945, consent decree of injunction herein. (R. 36.)

> "An injunction decree *does not create a right;* it is a remedy protective of a right; a party obtaining the injunction *does not obtain a vested right;* and accordingly its *prospective* features are subject to vacation or modification when warranted by equitable principles, whether the decree was entered in a contested case, as the result of a default, or by consent of the parties." (Moore's Federal Practice, Second Edition, Vol. 7, p. 285-286.)

From this basic concept, it logically follows that when the legal right which formed the basis for the injunction is changed or terminated, the injunction should be accordingly modified or vacated, insofar as its future application is concerned. Otherwise we would be faced with the situation of a continuing remedy for the protection of a non-existent right.

What is sought, of course, is simply the removal, from the scope of the December 7, 1945, injunction, of any prohibition against the negotiation and application of a union security agreement or agreements, as authorized by the 1951 amendments to the Railway Labor Act. Should the injunction be so modified, and should respondent Railroad enter into such an agreement with the labor organizations representing the involved crafts of its employees, then the plaintiffs and other employees in those crafts would be required, as a condition of continued employment, to become members of the labor organization representing their craft, "*Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the *same terms and conditions as are generally applicable to any other member* or with respect to employees to whom membership was denied or terminated *for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining member-*

ship." (Railway Labor Act, Sec. 2 Eleventh (a); emphasis supplied.)

The proposed modification would *not* vacate or terminate the injunction, but would only remove the prohibition indicated.

It would *not* affect the basic prohibitions against the kind of alleged discriminations which prompted the institution of this action in 1945 — i.e., hostile discrimination against particular employees or groups of employees with respect to promotion, seniority, overtime, and other rights and benefits under the collective bargaining agreements.

Being simply the removal of a prohibition, the modification would *not* operate to decide any future questions that might be raised concerning the validity of particular union security agreements that may be negotiated, authority to negotiate them, their proper interpretation and application, or questions of the interpretation and validity of the 1951 amendments to the Railway Labor Act itself. Respondent Railroad and its employees would be left free to raise such questions or disputes unhampered by the requested modification.

Specifically, the motion to modify the injunction was filed under Rule 60 (b) (5) of the Federal Rules of Civil Procedure, which provides in part as follows:

> "*Rule* 60. *Relief From Judgment or Order.*
>
> . . . . .
>
> "(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . . . (5) the judgment has been satisfied,

released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application*; . . ." (Emphasis supplied.)

Even without the authority thus expressly provided, it is well established that as a matter of general equity principles injunctions having continuing effect are subject to being vacated or modified, insofar as their future application is concerned, to conform to changed circumstances. As Professor Moore states, in discussing the effect of the present Rule 60 (b):

> "Prior to the Federal Rules it was settled that a court of equity had power to vacate or modify a final decree that had prospective application where it was no longer equitable that the decree should have such prospective effect. As Justice Cardozo stated in *United States v. Swift & Co.* a 'continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.' This could be justified on inherent power, on principles underlying a bill of review, or on a combination of these principles. Except insofar as principles underlying a bill of review would support relief, the first saving clause of original Rules 60 (b) was inept in preserving the power; but since the power was clearly rooted in practical good sense courts continued to exercise it under Rule 60 (b). And amended Rule 60 (b) now states that one of the reasons for granting relief from a final judgment is that 'it is no longer equitable that the judgment should have prospective application' ". (Moore's Federal Practice, Second Edition, Vol. 7, p. 90-91.)

Although in this case the trial court's decree of December 7, 1945, reserved continuing control of the action, power to modify the decree would be present even without such reservation. As stated in *United States v. Swift & Co.*, 286 U.S. 106, 114:

> "Power to modify the decree was reserved by its very terms, . . . If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

As we have pointed out, the modification sought here relates strictly to the prospective application of the injunction, and as such was clearly within the power of the court under the Rule invoked as well as accepted principles of equity jurisprudence.

The purpose of the original injunction was to protect rights which plaintiffs enjoyed by virtue of the Railway Labor Act. The statute was the sole source of those rights. Modification of the injunction to conform the scope of its protection to the scope of plaintiffs' continuing statutory rights thus does not thwart, but continues to effectuate, the only purpose of the original decree.

While it is generally said that the granting or denial of a motion to modify or dissolve an injunction rests within the discretion of the trial court, and its action will not be disturbed on appeal absent an abuse of that discretion, the rule is different where, as here, there is no dispute as to the facts and the ruling involved only questions of law and their application to the conceded facts. Here there was no factual issue for the District Court to resolve, and no question of burden of proof, since petitioners' motion was predicated entirely upon the amendment of the controlling statute, the Railway Labor Act. As stated at 28 Am. Jur., Injunctions, Sec. 328, p. 501:

> ". . . If the facts are such that solely questions of law are presented, the trial court's action is reviewable, and should be reviewed on appeal. *Differently stated, the trial court abuses its discretion where it fails or refuses to properly apply the law to conceded or undisputed facts.* A proper discretion does not

include the misapplication of the law to the facts, and where that is the case, the order appealed from will be reversed." (Emphasis supplied.)

As noted in the foregoing discussion of basic principles applicable to the modification of injunctions, the courts below clearly erred in refusing to recognize the amendment of the Railway Labor Act as sufficient ground for the requested modification.

Such refusal is clearly in conflict with the decision of this Court in *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, which recognizes a change in the law as sufficient basis for modification of an injunction.

The Court of Appeals for the Seventh Circuit similarly recognized that "the injunction will be vacated or modified where the law has been changed making acts enjoined legal". *Western Union Tel. Co. v. International Brotherhood, etc.*, 133 F. (2d) 955, 957.

One of the leading cases pertinent to our discussion, and which was cited by this Court as authority for its decision in *United States v. Swift & Co.*, 286 U.S. 106, is *Ladner v. Siegel*, 298 Pa. 487, 147 Atl. 699, 68 A.L.R. 1172.

There the court specifically listed a change in the law, either statutory or common, as one of the bases for modification of an injunction, and emphasized the point that injunctions do not create rights, saying:

"The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, and (b) where the law, common or statutory has changed, been modified or extended, and

(c) where there is a change in the controlling facts on which the injunction rested.

"... An injunction decree does not create a right; it protects the rights of the owner to the enjoyment of his property from injurious interference by the uses of other land. The right protected is an attribute of property existing through the application of common-law principles. *A decree preventing its injury does not give to the complaining party a perpetual or vested right either in the remedy, the law governing the order, or the effect of it.* He is not entitled to the same measure of protection at all times and under all circumstances. A decree protecting a property right is given subject to the rules governing modification, suspension, or dissolution of an injunction. The decree is an ambulatory one, and marches along with time affected by the nature of the proceeding." (Emphasis supplied.)

Another leading case, involving modification of an injunction to conform to a change in the law upon which it was based, is *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 359, 116 P. (2d) 1012, 136 A.L.R. 757. There the court modified an injunction to conform to a change in judicial law, resulting from this Court's overruling of its earlier precedents. The following language from the court's decision is particularly relevant here. Following extensive quotation from *Ladner v. Siegel, supra*, the court said:

"This rule is well established and many of the leading authorities will be found in the note in ALR above referred to and in 28 Am. Jur. p. 494, §323. Among the leading cases are *United States v. Swift & Co.*, 286 U.S. 106, 52 S. Ct. 460, 462, 76 L. Ed. 999, in which the court said that by granting a permanent injunction, 'a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned throug' changing circumstances into an instrument of wrong;' *Milk Wagon*

Drivers' Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 557, 85 L. Ed. 836, 132 ALR 1200, in which the court said: 'The injunction which we sustain is "permanent" only for the temporary period for which it may last . . . Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted;' and *Glenn v. Field Packing Co.* 290 U.S. 177, 54 S. Ct. 138, 78 L.Ed. 252, in which the court held that a modification is warranted by a change in the law by judicial decision. The latter point hardly requires citation of authority, for *obviously it is not equitable to continue to restrain a party from actions no longer unlawful whether the change in law has come about through new legislative enactment or through an authoritative change in judicial construction by the courts.* However the change may have come about, it is obviously not within the theory of a government of uniform laws conferring equal rights on all, as distinguished from a government of men conferring unequal privileges on some, that the state authorities should be further prevented from the enforcement of tax laws against this taxpayer and not against others similarly situated . . ." (Emphasis supplied.)

". . . Thus an adjudication that plaintiff was then entitled under the existing laws and facts to an injunction does not amount to an adjudication that it will always be entitled to it, regardless of changing circumstances or laws nor does it tie the hands of the equity court so as to prevent it from doing equity in the future. In other words, to say that the question may not be reopened for the purpose of determining whether the injunction should have been granted in the first instance is not to say that it may not be reopened for the determination of the question whether equity now demands that the injunction be modified, vacated, or continued further . . ."

Additional authorities supporting modification of an injunction to conform to a subsequent change in the law are discussed in the annotation following the *Santa Rita*

Oil Co. case, at 136 A.L.R. 765. See also the recent Kentucky decision in *National Electric Service Corporation v. D. 50 United Mineworkers*, 279 S.W. (2d) 808 (1955) where the court construed Kentucky's Civil Rule 60.02, which is the same as Rule 60 (b) of the Federal Rules, and set aside a judgment creating a permanent injunction because of a subsequent change in the law, saying:

> "Secondly, in addition to the authority of the above subsection of CR 60.02, the trial court may well have acted under an established principle governing injunctions. An injunction, whether permanent or temporary, is an equitable process that results only from the extraordinary powers of the chancellor, and is a continuing process over which the equity court necessarily retains jurisdiction in order to do equity. This includes power to modify or vacate it, if the law has changed or present considerations of equity demand it. See *Santa Rita Oil Co. v. State Board of Equalization*, 112 Mont. 359, 116 P. 2d 1012, 136 ALR 757; and the cases assembled in annotation in 136 ALR; *United States v. Swift*, 286 U.S. 106, 52 S. Ct. 460, 75 L. Ed. 999; *Ladner v. Siegel*, 298 Pa. 487, 148 A. 699, 68 ALR 1172.
>
> "The injunction, as such, serves to protect the status quo in respect to property rights under existing law and facts. *Kelly v. Earle*, 325 Pa. 337, 190 A. 140. A *change in either* serves as sufficient ground for modification or vacation of the original judgment—not by reason of the void or voidable aspect of the original decree—but through the chancellor's inherent power to correct that which it is no longer equitable to enforce.
>
> "In the case at bar, the trial court stated in its opinion the injunction was issued on the sole ground that the picketing had the unlawful purpose of coercing the employer to compel its eligible employees to become members of the union. The Garner case removed the power to use an injunction based on that

ground. The Chancellor, in exercise of his inherent power, was well within his right and duty in setting aside the injunction because of the subsequent change in law." (Emphasis supplied.)

In refusing to modify the 1945 injunction, the courts below commented that the 1951 amendments to the Railway Labor Act were only "permissive", in that they did not require union security agreements, and apparently concluded therefrom that the change in the law left it optional with the courts whether to continue the injunctive prohibition of such agreements.

There has, of course, never been any question here of asking the court to require the execution of a union shop agreement. But the amendment of the Act very definitely removed a pre-existing statutory prohibition, and modification of the injunction is here sought to conform to that change in the statute.

The language used by Congress was positive. It stated that union shop agreements of the type described "shall be permitted . . . Notwithstanding any other provision of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State". When Congress says something "shall be permitted", we think it is clear that the intent is that it shall not be prohibited. The plain import and effect of the statutory amendment was to make union security agreements lawful, as a matter of uniform national policy under the Railway Labor Act.

Summing up, we have in this case a judgment based solely on plaintiffs' rights under the Railway Labor Act as it was in 1945 with a declaration as to what those rights were and an injunction protecting them. The act is now changed, with respect to the subject matter of the pending

motion to modify the injunction. In its original form the injunction protects rights no longer in existence, and its enforcement would mete out punishment for acts no longer unlawful, but expressly authorized by Act of Congress.

We submit that it is inequitable to continue the prospective application of a decree protecting plaintiffs in matters in which they no longer have any substantive legal right to protection, and prohibiting to defendants, under pain of contempt proceedings, conduct in which they have an express, affirmative statutory right to engage.

The courts below clearly erred in holding, contrary to the decision of this and other courts, that the change in the law with which we are here concerned would not support modification of the injunction in the absence of some other change in the "facts." We can conceive of no change more basic, or compelling of a modification of an injunction in its future application, than a change in the law which completely undercuts the source of the right previously protected. When the injunction was issued, railroad union security agreements were prohibited by statute. Today they are expressly approved, the statute as amended stating that they "*shall be permitted*", and they could not now be enjoined. No change in the factual relationships of the parties could be as decisive.

II. Petitioners were not precluded from obtaining modification of the injunction by the consent nature of the original decree.

The courts below clearly erred in construing the consent decree of injunction as a contract, and denying modification for that reason. That such was the construction accorded the decree is evident from the following language in the opinion of the Court of Appeals:

". . . When the injunction was issued, the parties therein, *by their consent thereto*, provided that no such requirement of union membership should thereafter be in effect in any bargaining agreement under the Act. The Amendment of 1951, subsequent to the issuance of the injunction, did no more, the court held, than make negotiations for a union shop permissive, and did not nullify *the agreement or the injunction* issued . . ." (R. 152; emphasis supplied.)[5]

On the contrary, it is well established that the court's authority to modify the injunction was unimpaired by the fact that it was entered by consent of the parties. This was squarely and unequivocally stated by this Court in *United States v. Swift & Co.*, 286 U.S. 106, as follows:

". . . The result is all one whether the decree has been entered after litigation or by consent (*American Press. Assoc. v. United States*, L.R.A. 1918A, 1039, 157 C.C.A. 387, 245 Fed. 91). In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. *We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act.* A different view would not help them, for they were not parties to the contract, if any there was. All the parties to the consent decree concede the jurisdiction of the court to change it. The interveners gain nothing from the fact that the decree was a contract as to others, if it was not one as to them. But in truth what was then adjudged

[5]The District Court's opinion might indicate that it thought that in addition to the consent decree, there was a separate, "side" agreement not to ever negotiate for a union shop. Indeed, respondents' argument, in the courts below as well as in their briefs filed herein in opposition to the petition for a writ of certiorari, are calculated to convey that impression. The Court will, however, search the record in vain for one iota of evidence of the existence of such a contract. The only "agreement" was the simple act of consenting to the entry of the decree of injunction of December 7, 1945. Indeed, careful examination of respondents' briefs in opposition to certiorari will reveal that it is the consent decree itself which they rely on as constituting an agreement. Thus, respondent carrier's brief, at p. 17, states that "*In the consent decree*, the parties . . . agreed . . ."; and in the brief for other respondents, at p. 23, they refer to "This agreement, *as set forth in the consent decree* . . ."

was not a contract as to any one. *The consent is to be read as directed towards events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.*" (Emphasis supplied.)

In *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. (2d) 788, the Court of Appeals for the Tenth Circuit stated:

"We know of no case which holds that a consent decree imposing a continuing injunction deprives the court of its supervisory jurisdiction in the matter."

See also *Chrysler Corp. v. United States*, 316 U.S. 556, at 567.

Aside from the fact, as we have pointed out, that no agreement of the parties could support jurisdiction to grant the injunction, it is clear that the court below erred in construing the consent decree as a contract rather than a judicial act. If the act of consenting to the entry of a decree of injunction were to be accorded the effect thus attached to it by the courts below, then all consent decrees would necessarily be immune from modification. But as this Court recognized in the *Swift & Co.* case, quoted *supra*, such is not the law, and a consent decree is not "an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."

The lower courts' error in treating the consent decree as a contract comes full circle with the argument of respondents other than the carrier (brief in opposition, p. 11) that the basis for the original decree of injunction was not the Railway Labor Act but the contract. In other words, they urge that the injunction constituted a contract, and that the contract thus arrived at constituted the source of the right protected by the injunction.

The fact is that the complaint herein by its terms was predicated solely on the Railway Labor Act. The statutory source of the bargaining representative's fiduciary duty not to engage in acts of hostile discrimination against members of the craft represented, thus supplying federal jurisdiction which would otherwise be non-existent, was clearly pointed out by this Court's decision in *Tunstall v. Brotherhood of Locomotive F. & E.*, 323 U.S. 210. Thus, if the injunction here had not been based on the Railway Labor Act, not only would the District Court have lacked jurisdiction to issue it under the Norris-LaGuardia Act, as we have pointed out, but there likewise would have been a complete absence of federal jurisdiction, there being no diversity of citizenship or other basis for jurisdiction of the subject matter. *Gully v. First National Bank*, 299 U.S. 109; *Starke v. New York, Chicago & St. Louis R. Co.*, 180 F. (2d) 569.

It is of course apparent that the court's decree could not itself be the source of the rights which it was designed to protect. Here the source was purely in the statute, and when that was amended petitioners were entitled to have the injunction modified accordingly.

III. The courts below erred in basing their refusal to permit negotiation of union security agreements authorized by Congress upon bitterness and hostility between union and non-union employees resulting from strike-breaking activities of the latter, and having no connection with the injunction sought to be modified.

In addition to the erroneous conclusions that the change in the Railway Labor Act was insufficient to justify modification of the injunction, and that the consent nature of the original decree dictated against such modification, the courts below relied upon evidence of hostility and bitterness arising out of a 1955 strike as supporting the de-

termination that there had been no change in the circumstances giving rise to the injunction which would support modification. The Court of Appeals even commented gratuitously upon the fact that certain of respondent carrier's employees were sent to prison in connection with the burning of a railroad bridge during the strike (R. 150), a circumstance not alluded to by the District Court.

The irrelevance of this situation to the motion to modify is readily apparent. The lengthy testimony taken showed that it had nothing to do with this case, or discrimination in job rights because of membership or nonmembership in any of the defendant labor organizations. It was instead the aftermath of an economic strike, and the hostility, bitterness and antipathy lay between those who went out on strike, and those who remained at work during the strike, irrespective of whether the latter were members or non-members of the organizations. In view of the safeguards provided in Section 2, Eleventh, of the Act, the fact that the labor organizations fined or expelled disloyal members for their refusal to support the strike constitutes no objection to a removal of the injunction's prohibition against negotiation of union security agreements pursuant to that section.

Section 2, Eleventh, is a most carefully drawn piece of legislation. A union-shop agreement conforming to its requirements, which is the only kind that petitioners could validly negotiate with the carrier, cannot require any employee as a condition of his railroad employment to do more than apply for union membership and tender the initiation fee and the periodic dues and assessments required of all other members.

If, after applying therefor, an employee should be denied membership in the appropriate union for any reason other than failure to tender the dues, initiation fee, or

assessments, or should he be suspended or expelled from membership for some reason other than that, he would be legally entitled to continue in his railroad employment as a non-member and to enjoy the same rights and benefits under the applicable collective bargaining agreement as union member employees in the same classifications.

Respondents' arguments below, and in opposition to certiorari here, as to the harm that would befall non-union employees as a result of the modification of the injunction[6], are without foundation in fact or logic. No substantive rights of respondents would or could be affected by the proposed modification. As we have pointed out, rights find their source in the law, not in injunctions which are simply one form of remedy for their protection, and modification or vacation of a decree of injunction does not take anyone's rights away. And the statutory right to enter into union security agreements, hedged as it is with the safeguards prescribed by Section 2, Eleventh, does not and cannot operate to deprive anyone of his job unless he fails or refuses to comply with the union membership requirements which Congress has expressly sanctioned.

Respondents have argued that the requested modification of the injunction would result in a "grievous wrong" to them. The only "wrong" they might suffer would be the possibility of compulsory union membership under union security agreements that might be negotiated. Such

[6] Throughout this proceeding the carrier has been if anything more vehement than the other respondents in predicting the dire consequences that would ensue. For example, its brief in opposition to certiorari states that one of the purposes of the modification is to force non-union men out of their jobs (p. 13-14), and that "it would deprive the non-union men of the very things that were complained about; the right to overtime, the right to bid on new jobs, and the right of employment" (p. 26). In its zeal the carrier overlooks the fact that it was one of the original defendants against which the complaint sought relief, and one of the parties enjoined by the 1945 decree; and that none of the acts complained of or conduct enjoined could be consummated without its collaboration. Hirings, firings, promotions, exercise of seniority rights, assignment of overtime work, etc., are necessarily administered by the employer, not the union. Indeed, the right of the carrier to be heard at all in opposition to the proposed modification is at best questionable in view of its defendant status.

contention on their part is tantamount to saying that Congressional enactment of Section 2, Eleventh of the Railway Labor Act was a grievous wrong. Such an argument should be addressed to the Congress of the United States, not to the courts.

On the other hand, perpetuation of the injunction would deprive petitioners of the opportunity to obtain substantial income from the present non-union employees of the carrier, and force the union members to continue to bear a commensurately greater burden in supporting the costs of collective bargaining. As this Court said in *Railway Employes' Dept., AFL v. Hanson*, 351 U.S. 225, 231, in tracing some of the legislative history of Section 2, Eleventh:

> "... While non-union members got the benefits of the collective bargaining of the unions, they bore 'no share of the cost of obtaining such benefits.' Id., at 4. As Senator Hill, who managed the bill on the floor of the Senate, said, 'The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions.' 96 Cong. Rec., Pt. 12, p. 16279."

Aside from the monetary aspects of the situation, we submit that it is patently inequitable to continue to enjoin petitioners from engaging in conduct which is perfectly lawful and in accordance with current Congressional policy, for the purpose of preserving for respondents a remedy for the protection of rights which have ceased to exist.

CONCLUSION

For the foregoing reasons petitioners submit that the judgment below was in error and should be reversed, and pray that the case be remanded with directions for the entry of a judgment by the District Court granting the motion to modify the December 7, 1945, injunction so that it shall have no prospective application to prohibit the nego-

tiation, execution, or application and enforcement of any agreement or agreements authorized by Section 2, Eleventh, of the Railway Labor Act, as amended January 10, 1951, and that they may have their costs herein and such other relief as to the Court may seem proper.

Respectfully submitted,

RICHARD R. LYMAN
741 National Bank Building
Toledo 4, Ohio

ROBERT E. HOGAN
Kentucky Home Life Building
Louisville, Kentucky

Attorneys for Petitioners:

Of Counsel:

SCHOENE & KRAMER
1625 K. Street, N.W.
Washington 6, D. C.

MULHOLLAND, ROBIE & HICKEY
741 National Bank Building
Toledo 4, Ohio

System Federation No. 91,
Railway Employes'
Department, AFL-CIO
International Association of
Machinists
Sheet Metal Workers'
International Association
Brotherhood Railway Carmen
of America

International Brotherhood of Electrical Workers
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

Railroad Lodge No. 205 (Louisville, Ky.)
International Association of Machinists

Lodge No. 1073 (Corbin, Ky.)
International Association of Machinists

Subordinate Lodge No. 102 (Louisville, Kentucky)
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America

Pan American No. 576 (Louisville, Ky.)
Brotherhood Railway Carmen of America

New Bridge Lodge No. 284 (Ravenna, Ky.)
Brotherhood Railway Carmen of America

Local No. 445 (Ravenna, Ky.)
Sheet Metal Workers' International Association

Local No. 1004 (Louisville, Ky.)
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers;

Local No. 362 (Corbin, Ky.)
International Brotherhood of
Firemen, Oilers, Helpers,
Roundhouse and Railway
Shop Laborers; and

Local Union No. 1353
(Louisville, Ky.)
International Brotherhood of
Electrical Workers Or Their
Successors

PROOF OF SERVICE

I, Richard R. Lyman, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of August, 1960, I served copies of the foregoing Brief for Petitioners on the several parties thereto as follows:

1. On Respondent Louisville and Nashville Railroad Company by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, as follows:

John P. Sandidge,
Woodward, Hobson & Fulton
1805 Kentucky Home Life Building
Louisville, Kentucky.

H. G. Breetz,
Louisville and Nashville Office Building
Ninth & Broadway
Louisville, Kentucky.

2. On Respondents other than Louisville and Nashville Railroad Company by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record, as follows:

Marshall P. Eldred,
Brown & Eldred
Board of Trade Building
Louisville 2, Kentucky.

.....
Richard R. Lyman